No. 90-974

In The

Supreme Court of the United States

October Term, 1990

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

and

JESSE OLIVER, ET AL.,

Petitioners,

v.

JIM MATTOX, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does Section 2 of the Voting Rights Act, 42 U. S. C. 1973, apply to dilution claims in judicial election systems?

LIST OF ALL PARTIES

Plaintiffs:

League of United Latin American Citizens (Statewide)
LULAC Local Council 4434
LULAC Local Council 4451
Christina Moreno
Aquilla Watson
Joan Ervin
Matthew W. Plummer, Sr.
Jim Conley
Volma Overton
Gene Collins
Al Price
Judge Mary Ellen Hicks
Rev. James Thomas

Plaintiff-Intervenors:

Harris County:

Houston Lawyers' Association
Alice Bonner
Weldon Berry
Francis Williams
Rev. William Lawson
DeLoyd T. Parker
Bennie McGinty

Dallas County:

Jesse Oliver
Fred Tinsley
Joan Winn White

Defendants:

William P. Clements, Governor, State of Texas (Dismissed prior to trial)
Jim Mattox, Attorney General of Texas
George Bayoud, Secretary of State
Texas Judicial Districts Board

LIST OF ALL PARTIES – (Continued)

Thomas R. Phillips, Chief Justice, Texas Supreme Court
Mike McCormick, Presiding Judge, Court of Criminal Appeals
Ron Chapman, Presiding Judge, 1st Admin. Judicial Region
Thomas J. Stovall, Jr., Presiding Judge, 2nd Admin. Judicial Region
James F. Clawson, Jr., Presiding Judge, 3rd Admin. Judicial Region
John Cornyn, Presiding Judge, 4th Admin. Judicial Region
Robert Blackmon, Presiding Judge, 5th Admin. Judicial Region
Sam B. Paxson, Presiding Judge, 6th Admin. Judicial Region
Weldon Kirk, Presiding Judge, 7th Admin. Judicial Region
Jeff Walker, Presiding Judge, 8th Admin. Judicial Region
Ray D. Anderson, Presiding Judge, 9th Admin. Judicial Region
Joe Spurlock II, President, Texas Judicial Council,
Leonard E. Davis

Defendant-Intervenors:

Judge Sharolyn Wood (Harris County)

Judge Harold Entz (Dallas County)

Bexar County:

Judge Tom Rickoff
Judge Susan D. Reed
Judge John J. Specia, Jr.
Judge Sid L. Harle
Judge Sharon Macrae
Judge Michael D. Pedan

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

No. _____

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the League of United Latin American Citizens, et al., and Jesse Oliver, et al., pray that a Writ of Certiorari be issued to review the decision in this case of the United States Court of Appeals for the Fifth Circuit, *en banc*.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas has not been reported, but is included in the Appendix.[1] The opinion of a panel of the United States Court of Appeals for the Fifth Circuit is reported at 902 F. 2d 293 (5th Cir. 1990). The order granting rehearing en banc (sua sponte) is reported at 902 F. 2d 322 (5th Cir. 1990). The opinion of the United States Court of Appeals for the Fifth Circuit, *en banc*, is reported at 914 F. 2d. 620 (5th Cir. 1990), and reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended, provides as follows:

> (a) No voting qualification or prerequisite to voting, or standard, practice, or procedure

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[1] All references to the Appendix refer to the Appendix filed in No. 90-813, Houston Lawyers' Assn., et al. v. Jim Mattox, et al. The Houston Lawyers' Assn. was a plaintiff-intervenor in the case before the district court, as were Jesse Oliver, et al. who are joining petitioners League of United Latin American Citizens, et al. in this petition.

shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b(f)(2), provides, in pertinent part, as follows:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides, in pertinent part, as follows:

Whenever a State of political subdivision with respect to which the prohibitions set forth in

section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State of political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced with out such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other

appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with the section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provision of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

STATEMENT OF THE CASE

The Proceedings Below

This is a voting rights case brought by Black and Hispanic citizens of and organizations within the State of Texas. Suit was filed in the United States District Court for the Western District of Texas under the Voting Rights Act, 42 U.S.C. 1973, and under 42 U.S.C. 1983, alleging

violations of the Fourteenth and Fifteenth Amendments to the United States Constitution. Jurisdiction below was based upon 28 U.S.C. 1331.

At issue is the at-large method of electing district judges.[2] The challenge was limited to nine metropolitan counties (Harris, Dallas, Bexar, Tarrant, Travis, Lubbock, Midland, Ector, and Jefferson counties) out of Texas' 254 counties; however, the challenge included 172 (44%) of the state's then 375 district judges.

After a trial to the Court, the district judge entered findings of fact and conclusions of law, and found a violation of Section 2 of the Voting Rights Act in all nine counties. (Appendix, at pp. 183a-304a) The Court did not find that the 1985 Amendment to the Texas Constitution allowing a county to sub-divide itself for purposes of election of district judges was motivated by discriminatory intent. Finding of Fact No. 36, and Conclusions of Law Nos. 22-23. (Appendix, at pp. 282a-283a; 301a-302a)

In each county challenged, the trial court found for plaintiffs on each of the threshold *Gingles* factors, *Thornburg v. Gingles*, 478 U. S. 30 (1986):

- the minority group was sufficiently concentrated so as to constitute a voting age majority in a single member district, (Appendix, at pp. 200a-209a), and
- the minority group voted cohesively, (Appendix, at pp. 210a-275a), and

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[2] In Texas, the trial court of general jurisdiction is the district court. *Texas Constitution*, Art. 5, Sec. 8.

- a white voting bloc usually defeated the choice of the minority voters. (Appendix, at pp. 210a-275a).

In addition, the trial court found that voting in these counties was racially polarized, (Appendix, at pp. 210a-275a), and that there was a lack of success of minority candidates. (Appendix, at pp. 279a-281a). As required, it made findings regarding the "typical factors," (Appendix, at pp. 275a-285a) as discussed in the *Senate Report*, No 97-417, 97th Congress 2d Sess., reprinted in 1982 *U. S. Code Cong. & Admin. News* at pp. 177 et seq., which is a part of the legislative history of the 1982 amendments to the Voting Rights Act.

Finally, based upon the "totality of the circumstances," the trial court found that minority voting strength was diluted in each of the targeted counties. (Appendix, at pp. 297a-301a).

Although given an opportunity to do so, the Texas Legislature failed to remedy the discriminatory at-large election system. Therefore, on January 2, 1990, the trial court enjoined further use of the at-large electoral system in these counties. Pursuant, in part, to an agreement between the plaintiffs and the Attorney General for the State of Texas, it ordered a non-partisan, interim election plan under which the counties were sub-divided into districts coincident with existing electoral boundaries for state representatives, or county commissioners, or justice of the peace precincts. On January 11, 1990, this interim plan was stayed by the United States Court of Appeals for the Fifth Circuit pending appeal.

On May 11, 1990, that court reversed the district court, holding 2-1 that trial judges occupy single-member offices which are incapable of being further sub-divided. 901 F. 2d 293 (5th Cir. 1990). Four days later, pursuant to a majority vote of the active judges, a rehearing *en banc* was ordered, and on September 28, 1990, the *en banc* court reversed the trial court in a severely split opinion. 914 F. 2d 620 (5th Cir. 1990). (Appendix, at pp. 1a-182a).

The majority opinion, written by J. Gee, (Appendix, at pp. 1a-35a), held that even though an intentional discrimination claim under the Fourteenth and Fifteenth Amendments to the U. S. Constitution could be maintained for judicial elections, and even though Section 5 of the Voting Rights Act applies to judicial elections, and even though some elements of Section 2 apply to judicial elections, the amended Section 2 of the Voting Rights Act which incorporates a "results test" does not allow a vote dilution claim against a judicial election system, regardless of how discriminatory it may be.[3] They specifically overruled a prior opinion of that court to the contrary, *Chisom v. Edwards*, 839 F. 2d 1056 (5th Cir. 1988), *cert. denied sub nom. Roemer v. Chisom*, 109 S. Ct. 390 (1988).[4]

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[3] The findings of the district court, (Appendix, at pp. 183a-304a), undisturbed on appeal, establish that minority voters in the targeted Texas counties are unable to elect judges of their choice.

[4] *Chisom v. Roemer*, as the case is now called, is also before this Court on Petition for Writ of Certiorari, No. 90-797. *Chisom* involves the Louisiana Supreme Court. *LULAC* involves Texas trial judges. The Higginbotham concurrence in this case, 914 F. 2d 634-651, raises the issue of whether Section 2 of the Voting Rights Act covers the election of appellate state court judges but not trial judges. It is incumbent upon this Court to fully resolve the issue of Section 2 applicability to judicial elections.

One concurring opinion, written by J. Higginbotham, (Appendix, at pp. 47a-114a), following *Chisom*, supported the prior panel opinion in *LULAC* that although Section 2 of the Voting Rights Act covers judicial elections, there is an exception to coverage for trial judges based upon the concept that a single-member office is not amenable to further division.

The dissent, written by J. Johnson, (Appendix, at pp. 115a-182a), author of the *Chisom* opinion, strongly urged that all sections of the Voting Rights Act are applicable to all judicial elections, and that the minority vote dilution proved at trial should be remedied. He characterized the majority opinion as "dangerous" and a "burning scar on the flesh of the Voting Rights Act." (Appendix, at p. 116a).

Statement of Facts

Judicial districts are created by statute. District judges are elected in the targeted counties in county wide,[5] partisan elections, but each judicial candidate must file for a specific court, a numbered post, e. g. the 254th District Court. Each of the targeted judicial districts is county wide, with the exception of the 72nd Judicial District, which covers two counties.

Qualifications for office are set by the Texas Constitution and by statute. *Texas Const.*, Art. 5, Sec. 7. To become

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[5] The Texas Constitution requires judicial districts to be no smaller than a county unless authorized by a majority of the voters in the county. *Texas Const.*, Art. 5, Sec 7a(i). To date, no election under this provision has been held.

the party nominee for a numbered judicial post, a candidate must receive a majority of the votes cast, *Texas Elec. Code*, Sec. 172.003; however, in the general election, a plurality determines the winner. *Texas Elec. Code*, Sec. 2.001. A district judge's term is four years, and such terms are staggered in multi-judge counties.

Although a district judge usually sits in the county from which he/she is elected, jurisdiction of any district court is statewide. *Nipper v. U-Haul Co.*, 516 S.W.2d 467, 470 (Tex. Civ. App. 1974). Venue is determined by a complex set of statutes. *Texas Civil Practice & Remedies Code*, Ch. 15.

Minority electoral success has been minimal. A review of the targeted counties reveals the following:

County	No. of Judges	No. of Minority Judges	Total Population	Percent Minority[6]
Harris	59	3 (5%)	2,409,544	19.7%
Dallas	37	2 (5%)	1,556,549	18.5%
Tarrant	23	2 (9%)	860,880	11.8%
Bexar	19	5 (26%)	988,800	46.6%
Travis	13	0 (0%)	419,335	17.2%
Jefferson	8	0 (0%)	250,938	28.2%
Lubbock	6	0 (0%)	211,651	27.1%
Ector	4	0 (0%)	115,374	25.9%
Midland	3	0 (0%)	82,636	23.5%

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[6] "No. of Minority Judges" and "Percent Minority" here refer only to the ethnic or racial group on whose behalf a case was presented to the district court. For example, in Dallas County, there were 2 Black judges and one Hispanic judge at time of trial, and Blacks were 18.5% and Hispanics were 9.9% of the total population; however, a case was presented only on behalf of Blacks.

The above chart presents data as of the time of trial in September, 1989. Perhaps more revealing of the lack of minority access is the fact that in Harris County only two Blacks have defeated whites in seventeen contested judicial elections. In Dallas County, only two Blacks have won out of seven contests. Bexar County results reveal that only one Hispanic has been victorious in six contests. In the other targeted counties, no minority has ever won. In Jefferson, Lubbock, Ector and Midland counties, no minority has ever run. Findings of Fact No. 31. (Appendix, at pp. 279a-280a).

REASONS FOR GRANTING THE WRIT

I.

The Decision of the En Banc Fifth Circuit Conflicts with Applicable Decisions of This Court

Despite its contention to the contrary, the *en banc* decision of the Fifth Circuit conflicts with the decisions of this Court in *Haith v. Martin*, 618 F. Supp. 410 (E. D. N. C. 1985), *aff'd mem.*, 477 U. S. 901, 106 S. Ct. 3268, 91 L. Ed. 2d 559 (1986), and most recently, *Georgia State Board of Elections v. Brooks*, Civ. No. 288-146 (S. D. Ga. 1989), *aff'd mem.*, 111 S. Ct. 288 (1990).

These two decisions hold that Section 5 of the Voting Rights Act applies to judicial elections. The proscribed practices covered by Section 2 and Section 5 are the same: any "voting qualification or prerequisite to voting, or standard, practice, or procedure" with respect to voting. This Court affirmed the holding in *Haith v. Martin*, 618 F. Supp. at 413, that " . . . the Act applies to all *voting*

without any limitation as to who, or what, is the object of the vote." (emphasis in original).

Although the majority opinion of the *en banc* Fifth Circuit does not dispute the *Haith* decision, and although they assert that some portions of Section 2 may apply to the judiciary, they held that the "results test introduced in response to the holding in *Bolden* to govern vote dilution in the election of 'representatives,' . . . by its own terms does not" apply to the judiciary. *LULAC, en banc*, 914 F. 2d at 629. (Appendix, at p. 29a). As pointed out by both Judge Higginbotham's concurrence, *LULAC, en banc*, 914 F. 2d at 638-642, (Appendix, at pp. 62a-79a), and Judge Johnson's dissent, *LULAC, en banc*, 914 F. 2d at 655-659, (Appendix, at pp. 129a-140a), the majority has constricted the coverage of Section 2 by placing an unwarranted restriction upon the word "representatives," in light of the purposes of the Voting Rights Act, and the definitions of "voting" contained therein.

Given the identical language in Sections 2 and 5, basic tenets of statutory construction require that the sections be given identical meaning. *Pampanga Sugar Mills v. Trinidad*, 279 U. S. 211, 217-218 (1929); *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 433 (1932). The two sections work in tandem. The only distinction between them relates to whether a voting practice may be continued or may be implemented. Such a distinction does not relate to the application of the two sections to judicial elections. If the Fifth Circuit's decision is not reversed, then changes in judicial election procedures could be prohibited under Section 5, but those identical practices could not be eliminated under Section 2. Such an anomaly cannot be within the intent of Congress to "rid the

country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U. S. 301, 315 (1966).

Further, the recent ruling in *Brooks* may well lay to rest the contention that Section 2 of the Voting Rights Act does not apply to judicial elections. One of the questions presented in the jurisdictional statement in *Georgia State Board of Elections v. Brooks, supra*, was "Whether the Voting Rights Act Should be Construed to Apply to the Election of Judges?" By affirmance, the Supreme Court has "rejected the specific challenges presented in the statement of jurisdiction" and "prevents lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U. S. 173, 176 (1977).

In addition to being contrary to the interpretation of the Voting Rights Act by the Supreme Court, the action of the Fifth Circuit is contrary to the will of Congress, as expressed in the legislative history and reaffirmed by this Court, that the Act have the "broadest possible scope." *Allen v. State Board of Elections*, 393 U. S. 544, 566-567, 89 S. Ct. 817, 22 L.Ed.2d 1 (1969).

By ignoring the teachings of *Haith* and now *Brooks*, and the intent of Congress, the Fifth Circuit's *en banc* ruling has carved out an exception to the coverage of the Voting Rights Act which will deny thousands of minority voters an equal opportunity to vote for judges of their choice in an election system free of discriminatory elements. If the decision of the Fifth Circuit is allowed to stand, then the law will be that discrimination in voting will not be tolerated, *except in the election of judges*. This Court is called upon to correct this blatant denial of

minority voting rights and to effect the will of Congress that the nation's electoral systems be free of discrimination.

II.

There Is A Conflict Between the Fifth and Sixth Circuits

The decision of the Fifth Circuit in this case, which held that the system for electing judges is not amenable to a vote dilution challenge under the amended Section 2 of the Voting Rights Act, is directly contrary to the decision of the Sixth Circuit in *Mallory v. Eyrich*, 839 F. 2d 275 (6th Cir. 1988). At issue there was the county wide election of judges in a merged municipal (Cincinnati) and county (Hamilton County, Ohio) court system. The Sixth Circuit held that claims of vote dilution were covered by Section 2 of the Voting Rights Act, and remanded the case for further proceedings.

In reaching contrary conclusions, each court relied upon a set of principles, which, although the same, lead to contrary legal conclusions.

Analysis of the Conflict

1. Judges Are "Representatives" for Purposes of the Voting Rights Act.

Both decisions examine the use of the word "representatives" in the language of the amended Section 2, 42 U.S.C. 1973:

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes

> leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice. (emphasis added).

The majority in the Fifth Circuit concluded that Congress specifically chose a word, "representative," that had consistently been interpreted not to include the judiciary. They relied principally upon reapportionment cases which held that one-person, one-vote rules do not apply to the judiciary. *LULAC*, 914 F. 2d at 626, n. 9. (Appendix, at pp. 16a-17a). The majority then reasoned that since judges are not representatives for numerical apportionment purposes, then the addition of the word "representative" to the amended Section 2 prevents any claim of vote dilution from being made, even though other parts of Section 2 may apply to judicial elections. (Appendix, at pp. 24a-27a).

The Sixth Circuit took a broader view and interpreted "representative" to be inclusive of the judiciary under the reasoning that the Voting Rights Act is intended to remedy all discrimination in voting, and that the 1982 amendments were intended to expand the Act, not restrict it. That Court relied upon the definition of "voting" in the Act itself, 42 U.S.C. 1973 1 (c)(1):

> The terms "vote" and "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law

> prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

As a result the court determined that judges were "candidates for public . . . office," and, therefore, the system under which they are elected is subject to a dilution claim under the Voting Rights Act.

Following this Court's rule of statutory interpretation that the legislative history is the authoritative source for ascertaining Congress' intent in amending the Voting Rights Act, *Thornburg v. Gingles*, 478 U. S. at 43, n. 7, the Sixth Circuit noted that the terms "representatives," "candidates," and "elected officials" are used interchangeably throughout the text.[7]

As a result, the Sixth Circuit determined that "there is no basis in the language or legislative history of the 1982 amendment to support a holding that use of the word 'representative' was intended to remove judicial elections from the operation of the Act," *Mallory v. Eyrich*,

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[7] a. *Senate Report No. 417*, at 16: "elected officials;"

b. *Ibid.*, at p. 28: "Section 2 protects the right of minorities to elect candidates of their choice;"

c. *Ibid.*, at p. 30: "opportunity to . . . elect candidates of their choice;"

d. *Ibid.*, at p. 31: " . . . elect candidates of their choice;"

e. *Ibid.*, at p. 67: " . . . elect candidates of their choice;"

f. *Ibid.*, at p. 193: Additional Views of Senator Dole: " . . . equal choice of electing candidates of their choice."

839 F. 2d 278-281. Thus the judicial election system in Ohio was subject to a Section 2 attack.

2. The Non-applicability of One-Person, One-Vote Principles to Judicial Election Systems Does Not Foreclose a Vote Dilution Claim

It has been held that one-person, one-vote principles do not apply to judicial districts. *Wells v. Edwards*, 347 F. Supp. 453 (M. D. La. 1972) *aff'd*, 409 U. S. 1095 (1973). The circuits differ as to whether this principle can be extended to the question of coverage by the Voting Rights Act.

The Sixth Circuit specifically rejected this extension stating that one-person, one-vote principles address an equal protection problem under the Fourteenth Amendment, whereas analysis of a Section 2 claim involves the construction of an act of Congress outlawing racial discrimination in voting. *Mallory v. Eyrich*, 839 F. 2d 277-278.

The majority of the Fifth Circuit held that vote dilution claims were based upon one-person, one-vote principles, and therefore if the former did not apply to the judiciary, then neither could the latter. *LULAC, en banc*, 914 F. 2d at 627-628. (Appendix, at pp. 20a-24a). However, the concurrence argued that vote dilution cases against the judiciary are not precluded by one-person, one-vote principles. They reasoned that racial and non-racial acts by the state that deny voting strength are not legally the same: one is facially neutral in the matter of race; the other rests on the concern of submerging the voting strength of minorities by the combined force of bigotry

and election methods. *LULAC, en banc*, Higginbotham, concurring, 914 F. 2d at 643. (Appendix, at pp. 80a-82a).

3. The Interpretation of the Voting Rights Act by the Attorney General Is Authoritative

As this Court has noted in *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110, 131, 98 S. Ct. 965, 55 L. Ed. 2d 148 (1978), interpretation of the Voting Rights Act by the Attorney General constitutes a compelling argument "especially in light of the extensive role the Attorney General played in drafting the statute and in explaining its operation to Congress."

At the request of the Fifth Circuit, the present Attorney General filed an *amicus* brief before the *en banc* court, and sent his Assistant in charge of the Civil Rights Division to personally argue this case to emphasize his contention that "The United States has consistently interpreted the coverage language of Section 2 and the almost identical language in Section 5 to apply to the election of all judges (citations omitted)." Supplemental Brief for the United States as *Amicus Curiae*, filed June, 1990, in 90-8014, *LULAC, et al. v. Mattox, et al.*

Contrary to *Sheffield*, the *en banc* Fifth Circuit characterized the viewpoint of the Attorney General that Section 2 of the Voting Rights Act covers judicial elections as one of a "scatter of birdshot contentions," *LULAC, en banc*, 914 F. 2d at 630, (Appendix, at p. 30a), and dismissed the Attorney General's interpretation without analysis.

The Sixth Circuit, however, accorded due recognition to the view of the Attorney General that Section 2 of the Voting Rights Act applies to judicial elections. *Mallory v. Eyrich*, 839 F. 2d at 281.[8]

The Conflict Involves an Important Question of Fundamental Rights

Cases involving judicial elections have been heard or are pending in several jurisdictions. Until the Fifth Circuit's decision in *LULAC*, no circuit court and no trial court, without being reversed, had held that Section 2 of the Voting Rights Act does not apply to vote dilution claims involving judges.[9] Unless resolved by this Court, it is obvious that there will be an important and recurring conflict involving the basic right to vote. Given the

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[8] Although not concerned with judicial elections, the Eleventh Circuit has also affirmed that "[n]owhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 [of the Voting Rights Act] on the function performed by an elected official." *Dillard v. Crenshaw County*, 831 F. 2d 246, 250 (11th Cir. 1987).

[9] *Mallory v. Eyrich*, 839 F. 2d 275 (6th Cir. 1988)
Chisom v. Roemer 853 F. 2d 1186 (5th Cir. 1988)
Clark v. Edwards, 725 F. Supp. 285 (M. D. La. 1988)
Rangel v. Mattox, (5th Cir. No. 89-6226)
Nipper v. Martinez, No. 90-447-Civ-J-16 (M. D. Fla. 1990)
SCLC v. Siegelman, 714 F. Supp 511 (M. D. Ala. 1989)
Brooks v. State Bd. of Elec., 111 S. Ct. 288 (1990)
Hunt v. Arkansas, No. PB-C-89-406 (E. D. Ark. 1989)
Williams v. St. Bd. of Elec., 696 F. Supp. 1563 (N. D. Ill. 1988)
Martin v. Allain, 658 F. Supp. 1183 (S. D. Miss. 1987)
Alexander v. Martin, No. 86-1048-CIV-5 (E. D. N. C.)
LULAC v. Texas, No. B-89-193 (S. D. Tex. 1989)

number of cases pending and the fundamental nature of the issue, it would be intolerable to allow this conflict to continue unresolved.

The conflict between the Fifth and Sixth Circuit's interpretation of the coverage of the Voting Rights Act as it applies to judicial elections should be resolved by this Court.

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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